Michał Dudek

Remarks on the Non-Essentialist Approach to Legal Pluralism of Brian Z. Tamanaha[1]

Michał Dudek

Assistant professor in the Department of Sociology of Law at the Jagiellonian University in Krakow, Poland. Author of monograph Komunikowanie prawa w dobie pluralizmu kulturowego *[The Communication of Law in the Age of Cultural Pluralism] (Kraków 2014) and publications concerning, i.a., legal policy and axiology of law, visuality and law and technology and law.*

✉ michal.dudek@uj.edu.pl

https://orcid.org/0000-0001-6294-6027

Key words: sociology of law, legal pluralism, Brian Z. Tamanaha

The purpose of the article is to present basic argumentation of Brian Z. Tamanaha leading him to his original non-essentialist approach to legal pluralism[2] which

1 Previous version of this article was presented at the scientific conference *Bliski Wschód a Europa. Problemy tożsamości i różnorodności* [Middle East and Europe. Problems of Identity and Diversity] on 16-19th November 2017 in Hebdów, Poland. I would like to take this opportunity to express my gratitude to the participants and organisers (especially Bartosz Bodziński-Guzik) for the invitation and inspiring comments. This of course, does not alter the fact that only I am responsible for any substantive shortcomings of this paper. This paper is a translation of paper published originally in Polish: *Komentarz do nieesencjalistycznego ujęcia pluralizmu prawnego Briana Z. Tamanahy*, „Forum Prawnicze" 2017, no. 6 (44), p. 25–38.

2 Although Tamanaha discusses legal pluralism in few publications (see esp. *The Folly of the 'Social Scientific' Concept of Legal Pluralism*, „Journal of Law and Society" 1993, vol. 20, no. 2 or *Understanding Legal Pluralism. Past to Present, Local to Global*, „Sydney Law Review" 2008, vol. 30, no. 3), the broadest dimension of his non-essentialist approach can be observed in *A General Jurisprudence of Law and Society*, Oxford 2001, p. 171–205 (where he not only repeats, but also develops earlier *A Non-Essentialist Version of Legal Pluralism*, „Journal of Law and Society" 2000, vol. 27, no. 2). Hence, this article focuses on B. Z. Tamanaha, *A General Jurisprudence…*, op. cit. In addition to a very frequent reference in the literature to legal pluralism offered by Tamanaha, it is also the subject of more complex comments, many of which, however, seem to focus on general theses on law, related obviously to the concept of non-essentialist legal pluralism, see e.g. K. E. Himma, *Do Philosophy and Sociology Mix? A Non-Essentialist Socio-Legal Positivist Analysis of the Concept of Law*, „Oxford Journal of Legal Studies" 2004, vol. 24, no. 4; V. Saleh-Hanna, *Women, Law, and Resistance in Northern Nigeria. Understanding the Inadequacies of Western Scholarship* (in:) V. Saleh-Hanna (ed.), *Colonial*

refuses to make any assumptions about the characteristics that law must display to be recognized as law; it is also an attempt to evaluate this concept and its justification. Legal pluralism itself, most fundamentally understood as the situation of parallel functioning of many (minimum two) different legal orders in a given time and area,[3] is an issue noticed in the field of sociology of law basically from its beginnings. Conceptualization of this phenomenon can eventually be noticed not only in the work of Eugen Ehrlich, but also Leon Petrażycki.[4] Those, of course, are not the only names cited in the context of the discussion about legal pluralism. Leaving aside the controversies whether authors themselves interpret their ideas as concepts of legal pluralism or possible changes to original approaches,[5] it is also worth mentioning Sally Falk Moore, John Griffiths, Gunther Teubner and Roger Cotterrell.[6] It should be noted, however, that this indication is far from an exhaustive list of scholars trying to impose a certain theoretical framework on the phenomenon they are interested in.

In the context of the current, rich discussion about legal pluralism, it is Tamanaha, however, who turns out to be its most interesting theoretician, as he seems to reject all previous conceptualizations of the phenomenon and in their place, he proposes a new, specifically radical approach. As he argues, its benefit is primarily to avoid one fundamental issue with current concepts of legal pluralism – overly wide conceptualization of law, which makes distinguishing law from non-law almost impossible. As will be argued below, not only Tamanaha's solution to this problem seems questionable. The non-essentialist concept of legal pluralism leads to many other issues. An attempt at a more accurate enumeration of advantages and disadvantages of the discussed idea will be needed before it is generally assessed and decided to be applied in the analyses of specific realities. In the end, even a brief observation of the phenomena related to a political or legal practice in a broad sense, not only the most recent ones[7]

Systems of Control. Criminal Justice in Nigeria, Ottawa 2008, p. 329–336; W. Twining, *General Jurisprudence. Understanding Law from a Global Perspective*, Cambridge 2009, esp. p. 88–121 (a shorter version of idem, *A Post-Westphalian Conception of Law*, „Law & Society Review" 2003, vol. 37, no. 1); B. Dupret, *Prawo w naukach społecznych* [Law in Social Sciences], transl. J. Stryjczyk, Warszawa 2010, esp. p. 191–195; idem, *Adjudication in Action. An Ethnometodology of Law, Morality and Justice*, transl. P. Ghazaleh, Farnham 2011, esp. p. 31–35; V. M. Muñiz-Fraticelli, *The Structure of Pluralism. On the Authority of Associations*, Oxford 2014, esp. p. 143–149; K. M. Ehrenberg, *The Functions of Law*, Oxford 2016, p. 141–145; T. Gizbert-Studnicki, A. Dyrda, A. Grabowski, *Metodologiczne dychotomie. Krytyka pozytywistycznych teorii prawa* [Methodological Dichotomies. A Critique of Positivist Theories of Law], Warszawa 2017, esp. A. Dyrda, p. 237–251; D. v. Daniels, *A Genealogical Perspective on Pluralist Jurisprudence* (in:) N. Roughan, A. Halpin (eds.), *In Pursuit of Pluralist Jurisprudence*, Cambridge 2017, esp. p. 175–181. Against this background, this paper focuses solely on the non-essentialist approach to legal pluralism. The aim below is to avoid repeating the issues perceived by previous commentators with Tamanaha's reflections on law in general, legal pluralism itself or both of these strands viewed together. Instead, it aspires to highlight the previously largely unstressed controversies in the 'content' of concept of the non-essentialist legal pluralism and argumentation in its favour.

3 J. Winczorek, *Pluralizm prawny* [Legal Pluralism] (in:) A. Kociołek-Pęksa, M. Stępień (eds.), *Leksykon socjologii prawa* [Lexicon of Sociology of Law], Warszawa 2013, p. 181–182; A. Kojder, *Pluralizm prawny* [Legal Pluralism] (in:) A. Kojder, Z. Cywiński (eds.), *Socjologia prawa. Główne problemy i postacie* [Sociology of Law. Main Problems and Figures], Warszawa 2014, p. 295.

4 J. Winczorek, *Pluralizm prawny wczoraj i dziś. Kilka uwag o ewolucji pojęcia* [Legal Pluralism Yesterday and Today. A Few Remarks on the Evolution of the Concept] (in:) D. Bunikowski, K. Dobrzeniecki (eds.), *Pluralizm prawny. Tradycja, transformacje, wyzwania* [Legal Pluralism. Tradition, Transformations, Challenges], Toruń 2009, p. 18–19.

5 Cf. for example approach of Moore herself and Griffiths' change of view described in: B. Z. Tamanaha, *Understanding Legal Pluralism…*, op. cit., p. 392–396.

6 J. Winczorek, *Pluralizm prawny wczoraj i dziś…*, op. cit., p. 23–24, 25–31.

7 The phenomenon of regionalization of interpretation, not limited to the period of any of the previous terms of office of the Sejm of the Republic of Poland, see e.g. T. Stawecki, *Prawo w książkach i prawo na dyskach – konsekwencje dla praktyki wykładni prawa* [Law in Books and Law on Disks –

and not only noted in the domestic reality,[8] but also outside Poland[9] can justify the assumption that legal pluralism is a fact and as such, requires appropriate theoretical tools. It is then worth taking the trouble of answering the following question: in the face of suggested phenomena and tendencies, what is the sense and degree to which Tamanaha's concept can be useful? However, before an answer is provided and a number of other comments to it are presented, one should introduce it, at least briefly.

Tamanaha begins his reflections on legal pluralism as well as the pursuit of his own concept by pointing out the most important in his view errors in previous conceptualizations.[10] Above all, he believes that it is wrong to start analyzing the phenomenon of legal pluralism from adopting a specific and more or less extensive definition of law; though not only among theoreticians of legal pluralism but also in general (regardless of whether it is 'ordinary' people or learned lawyers, sociologists, anthropologists or philosophers) there has never been and most probably will not be a consensus as to any definition. However, not only insisting on defining the law is wrong despite each definition being seemingly more or less questioned, but Tamanaha also argues that the definitions offered by the existing theoreticians of legal pluralism usually make it impossible to distinguish law from what either is not law or is difficult to be recognized as law. As an example, he provides the mentioned classic Ehrlich who is criticized not only by Tamanaha for his approach to law being simply too general to be used as a basis for detailed (and so assuming subtle distinctions) analyses.[11] Without considering here the extent to which Tamanaha's general conclusions are in fact adequate to all other approaches to legal pluralism,[12] it should be noted that the commented author is actually keen in using similar and very broad generalizations.

The analysis of definitions constructed by the said theoreticians of legal pluralism or used by them for their own purposes leads Tamanaha to distinguishing *de facto* only two basic ways of defining the law.[13] Firstly, referring mainly to works from the field of anthropology or anthropology of law, or part of sociology of law, he indicates the recognition of law as stable patterns of specific activities in given groups or entire communities. Of course, it is right on the ground of such conceptualizations where it becomes very difficult, if not even impossible, to distinguish law from what is not law or what would rather not be defined as one. In the end, if only certain patterns of behaviour developed in social practice among a specific population are to be considered as law, then the rules of mutual neighbourly help on collection of agricultural crops, backyard football matches or proper dressing according to an occasion, or rules of politeness can also be considered so. In fact, it is dif-

Consequences for the Practice of Interpreting the Law] (in:) S. Lewandowski, H. Machińska, J. Petzel (eds.), *Prawo, język, logika. Księga jubileuszowa profesora Andrzeja Malinowskiego* [Law, Language, Logic. The Jubilee Book of Andrzej Malinowski], Warszawa 2013, p. 243.

8 A series of disputes that are part of the wider constitutional crisis in Poland, see e.g. P. Radziewicz, P. Tuleja (eds.), *Konstytucyjny spór o granice zmian organizacji i zasad działania Trybunału Konstytucyjnego: czerwiec 2015 – marzec 2016* [Constitutional Dispute about the Limits of Changes in the Organization and Rules of Operation of the Constitutional Tribunal: June 2015 – March 2016], Warszawa 2017. Nevertheless, it should also be noted that pluralisation/departure from monism of the Polish legal order, also in reference to the activities and impact of the Constitutional Tribunal, was noticed much earlier, see T. Stawecki, W. Staśkiewicz, J. Winczorek, *Między policentrycznością a fragmentaryzacją. Wpływ Trybunału Konstytucyjnego na polski porządek prawny* [Between Polycentrism and Fragmentation. The Impact of Constitutional Tribunal Rulings on the Polish Legal Order], Warszawa 2008, p. 76.

9 For example the dispute on the independence referendum in Catalonia on 1st October 2017.

10 B.Z. Tamanaha, *A General Jurisprudence…*, op. cit., p. 172–175.

11 Ibidem, p. 176; See also A. Kojder, *Z Czerniowców w szeroki świat… Eugen Ehrlich i narodziny idei socjologii prawa* [From Czernowitz to the Wide World… Eugen Ehrlich and the Birth of Idea of Sociology of Law] (in:) A. Flis (ed.), *Stawanie się społeczeństwa. Szkice ofiarowane Piotrowi Sztompce z okazji 40-lecia pracy naukowej* [Becoming of a Society. Sketches Offered to Piotr Sztompka on the Occasion of 40th Anniversary of Scientific Work], Kraków 2006, p. 143–144.

12 For example whether similar delimitation issues are noticed with the mentioned Petrażycki.

13 B.Z. Tamanaha, *A General Jurisprudence…*, op. cit., p. 175–181.

ficult to point out something that is not the law. As a consequence, demonstrating the multiplicity of 'laws' may turn out to be a relatively easy task, although another perspective is allowed, according to which if generally recognized patterns of a social behaviour are considered the law, then pluralism understood as a coexistence of minimum two different orders will not occur. After all, almost everything will fit or be able to be contained in one law. Therefore, the existence of two legal orders next to each other, not to mention a larger number, can be considered very unlikely.

If generally recognized patterns of a social behaviour are considered the law, then pluralism understood as a coexistence of minimum two different orders will not occur. After all, almost everything will fit or be able to be contained in one law.

The second method of defining law indicated by Tamanaha is, in turn, associated above all with the tradition of analytical theory and philosophy of law under the sign of Herbert L. A. Hart. It boils down to perceiving law as an institutionalized application or enforcement of norms that arose within the activity of specific institutions. This method of recognizing law is also criticized for inadequacy. Concededly, one can suppose that the definitions using the category of institutionalization in fact support the modern state and laws created within its structures, but it must be remembered that such institutionalized creation, application, and even enforcement of rules are also present outside the state's structures. It is sufficient to give an example of the activity of contemporary sports federations or scientific associations and try to answer the question whether the rules created within such structures are the law, in order to fully realize it. Thus, despite the significant narrowing approach to this method of grasping the law in comparison to the first one distinguished by Tamanaha, it still seems to be overly wide. Again, giving up an attempt to assess the extent in which Tamanaha's only two reconstructed ways of defining the law are adequate to the wealth of previous attempts to grasp its alleged essence, one may agree with the following statement of his. Within both these basic ways of defining law, one formula is finally sought that would be adequate to the entire field. According to Tamanaha, the use of some more specific form of the first or second way of defining law by theoreticians of legal pluralism is not the last fundamental mistake that they make.

Namely, Tamanaha also opposes broadly understood functionalism in definitions of law.[14] He specifically means formulas containing an indication of the most crucial purposes that law is supposed to implement in order to be referred to as the law. He recognizes formulas similar to the following one – 'the law provides social order' – as wrong not only because only some elements of law are effective in achieving the assumed function, but also because this depends on circumstances, as general functional effectiveness of the law may undergo significant changes, and in the face of its decrease one must eventually take into account the question whether the law losing its effectiveness is still the law. The functionalist conceptualization of law is also wrong because a given function supposed to be brought about by the law, which can include not only the mentioned social order, but also the social exchange, socialization or basically anything that any given theoretician would be ready to accentuate, can

14 Ibidem, p. 176, 179, 180.

actually be successfully implemented by something other than the phenomenon defined by this function. In the end – is it in fact only the law that is responsible for the social order? If not, and so when the social order could also be explained by referring to something else than the law, e.g. morality, customary and even religious norms, then defining and identifying law on the basis of the function of providing the social order turns out to be simply inadequate. Since the function favoured in a given functionalist definition of law is actually performed by many other phenomena or objects in social life, it is incapable of grasping law and nothing more but law. Tamanaha, again, at a very large and not undisputable level of generality, points out an erroneous way of conceptualizing law, which can also be used while discussing legal pluralism.

However, as already presented, Tamanaha does not criticize current legal pluralism for the sake of sheer criticism, but on the basis of his observations and analyses, he wants to propose the new theoretical framework. In the face of the indicated issues, he suggests to abandon the essentialist conceptualization of law, that is, defining law by any characteristics necessary for it to be defined as such. Instead, while dealing with the phenomenon of legal pluralism, one should make a starting assertion that the law is what is recognized as the law by people.[15] Such a specific escape from the effort of formulating a more substantial concept of law Tamanaha justifies by the conclusion from analyses carried out by him and briefly presented above which, in turn, lead him to a judgment that what the law is and what it does cannot be put into one universal formula. The law seems to always escape essentialist conceptualizations to a greater or lesser extent and for this reason, it should be grasped in the most formal way without implying its necessary characteristics. Tamanaha concludes that the best way to address such non-essentialism in the conceptualization of law is to say that the law *de facto* is what people 'label' as the law; what they call as that. He also adds that, in principle, his proposal is not a classic definition, but a way to delimit law from what is not law; something with which, as has been mentioned, the vast majority of theoreticians have a big problem, regardless of which of the three methods of conceptualizing law (referring to patterns of behaviour, institutionalization or function) indicated above they opt for. Additionally, in accordance with Tamanaha's reconstruction, when the foregoing theoreticians of legal pluralism begin their deliberations from certain substantial, essentialist definitions of law, it leads to the very phenomenon of legal pluralism being grasped as a co-occurrence of various manifestations of law (in a specific time and area), which is understood on the basis of one, particular formula assumed by a given scholar.[16] Tamanaha's position precludes a similar research practice, for at the beginning of his analysis he rejects the assumption of the existence of any specific characteristics or properties that the law is supposed to have, also in its many parallel manifestations. According to his views, legal pluralism will occur when various phenomena are eventually 'labeled' as the law by people and between these social identifications there are smaller or larger differences.[17] In other words, when at a given time and place, among a given population there are different opinions as to what the law is, that is when, for instance, one part of a society sees it in given objects and phenomena, whereas the other does not necessarily share that opinion and identifies with it different things, then according to the statement – 'law is what people define as such', one can talk about legal pluralism. Not in a sense of coexisting various manifestations of what meets the requirements of a specific concept of law, adopted by any given theoretician (reminiscent of the approaches criticized by Tamanaha), but in terms of the multiplicity of different social identifications of law.

As it may be easy to guess at this stage, while developing his non-essentialist approach to legal pluralism Tamanaha proposes to perform analyses on two different levels in a specific order[18] during its application.

15 Ibidem, p. 193. Tamanaha sustains this formula in the later text on legal pluralism, see idem, *Understanding Legal Pluralism*…, op cit., p. 396, and also as part of his latest monographic work, which deals in law in general, but no longer takes into consideration the pluralism itself so explicitly, see idem, *A Realistic Theory of Law*, Cambridge 2017, e.g. p. 194.

16 B.Z. Tamanaha, *A General Jurisprudence*…, op. cit., p. 194.

17 Ibidem.

18 Ibidem, p. 195–197.

Since the main emphasis is put on what people treat as the law, one should first determine what exactly and by whom is identified as such. The first step in a practical implementation of the non-essentialist approach to legal pluralism is to try to provide an empirically based answer to the question of what is 'labeled' as law in a given time interval and area inhabited by a specific population. Upon collection of such 'folk' testimonies and views on what the law is, one should go on another level of analysis, which consists in attempting to identify on the basis of collected empirical data (social opinions) the general features or properties of what has been 'labeled' as the law. To simplify, one can say that Tamanaha proposes to first ask people about what they treat as the law (by applying appropriate empirical research methods), and then with reference to the gathered data, one should carry out generalizing analysis, the result of which would be the characteristic of what particular groups specify as the law.

Although Tamanaha just discerns these two levels of analysis, one may wonder whether it would be necessary to add another level which could be regarded as a control one. Namely, it cannot be ruled out *in abstracto* that identifications of law in a given population are so numerous, mutually inconsistent and ultimately address many different objects and phenomena, that generalizations carried out on the second level may not be sufficiently subtle to preserve adequacy of certain social testimonies collected as part of the first stage. Since Tamanaha clearly supports the formulation of empirically established assertions, it is worth submitting a postulate to supplement his research scheme with a third stage – the presentation of compiled generalizations from the second stage to seek opinion of the representatives of a given population, whose identifications of law were collected during the first stage. If they accept that the conducted generalization conveys their view on the law, the fundamental research effort can be considered successful. If, however, the people whose testimonies were collected in the first stage did not find their full view reflected in the generalizations from the second stage, then such negative result of the third, control stage would prompt appropriate adjustments in the analyses conducted with the empirical material. Although such a direction for the development of Tamanaha's findings is possible, it is difficult to speculate at this point whether he would accept it.

It is certain, however, that many other remarks can be made in regards to Tamanaha's non-essentialist legal pluralism. Following Tamanaha's analysis, who upon presenting the bases of his approach focuses on indicating what he considers to be advantages and disadvantages of this concept, one can observe that it is worth dealing first with the advantages, both the undisputed and the doubtful ones, as well as those noticed and unnoticed by the commented author himself.

As an undisputed advantage of his own view, based on the non-essentialist legal pluralism, Tamanaha recognizes the fact that one can successfully distinguish law from non-law.[19] Although at first glance this positive assessment should not raise any doubts, it must be said directly that it is legitimate, and so the non-essentialist approach to legal pluralism does not fall into delimitation issues of previous concepts on one crucial condition. Subjective beliefs of several people about an object or phenomenon should simply be equated with the very subject (a reference point) of those beliefs. Tamanaha's position turns out to be entangled in a very subtle yet significant ontological problem as he seems to identify the subject of individual views – the law – with those views, i.e. opinions about what the law is or what can be considered the law. The acceptance of such position or its lack depends, of course, on the views on social constructivism in a general sense, to which he refers.[20] The supporters of constructivism may simply accept the radical position of Tamanaha as to defining or distinguishing law from non-law, along with suggested consequence of identifying the subject of beliefs with the very beliefs. On the other hand, those assuming, to a lesser or greater degree, the objectivity of certain social life phenomena and thus not necessarily seeing equality between the law and people's views on what it is, may be sceptical about Tamanaha's concept. For them, the collected statements about what the law is from the perspective of several people are not at all the basis for identifying it and distinguishing it from what it is not. The most crucial asset of Tamanaha's concept perceived by him –

19 Ibidem, p. 197.

20 Ibidem, p. 142, 162.

the ability to distinguish law from non-law – ceases then to be an objective and undeniable advantage. Whether one actually grants the commented author the achievement which he seems to claim credit for depends on the preferences of people evaluating his concept and the extent to which they accept or reject basic ideas of social constructivism. To that effect, the cited advantage of Tamanaha's position turns out to be strongly relative.

The advantage of Tamanaha's concept which, in turn, seems non-relative and independent of the adopted assumptions or assessing criteria, is that a lot of research issues are generated on its basis. Although Tamanaha himself focuses on the following research question which in virtue of his arguments is immediately obvious – 'who, why and what one identifies as law',[22] there are definitely other interesting issues worth considering. Not only it is worth thinking through

Tamanaha's position turns out to be entangled in a very subtle yet significant ontological problem as he seems to identify the subject of individual views – the law – with those views, i.e. opinions about what the law is or what can be considered the law.

A similar character seems to have the second advantage that Tamanaha claims to himself, which ultimately is closely related to the first one. Namely, he argues that his concept enables much richer conceptual instruments where the categories of different types of social norms (normative pluralism) as well as internal pluralisms of the distinguished categories of those norms and legal pluralism itself are clearly distinguishable from one another.[21] With reference to an earlier remark, one can ask whether the basic types of social norms themselves and their possible internal pluralisms will be distinguishable, or whether it will actually be possible to distinguish or separate only social assertions, identifications of moral, legal, religious or customary norms based on which one will be able to determine the degree of pluralization of views on a certain topic in a given population. Again, accepting the remark on this advantage of the non-essentialist legal pluralism seems to ultimately depend on whether one shares the controversial views on the mentioned social constructivism.

correlation between responses to the indicated question with different socio-demographic variables of respondents, but also determining, in the light of the collected testimonies, any specific borderline conditions to identify certain phenomena as legal ones in a given society or within specific, identifiable social groups. The latter can, however, be arranged within the mentioned framework of the second level of legal pluralism analyses distinguished by Tamanaha, whereas the obtained results may possibly be subject to control as part of the suggested third stage or its appropriate modification. Although a very modest analysis of Tamanaha's concept in terms of its empirical application or prospect for socio-legal research suggests its great potential, the author himself does not seem to notice it. Instead of developing the strand of this significant advantage, he goes on to point out another positive side of his concept, which, however, may raise serious doubts just like the previously commented elements of Tamanaha's affirmative self-evaluation.

21 Ibidem, p. 198.

22 Ibidem, p. 199.

Namely, he argues that the discussed assertion that the law is what people signify as such is positive in regards to not only avoiding any presuppositions about law, but also assumed hierarchies of validity and significance of its different types.[23] However, in view of such a statement, the question may arise as to whether the lack of hierarchy of different types of law is desired. This thread, however, will be discussed later in reflections on the flaws of the concept in question.

Tamanaha himself indicates some issues related to his concept, but as it is shown below, one can wonder whether he pays attention to all and most important ones. If the law is to be what people recognize as such, then he notices the need to supplement his concept with an answer to the following question: 'who exactly and how many people must recognize something as the law in order for it to «count»'?[24] In fact, complementing his concept with a solution to this issue seems necessary. It should be noted, however, from a more critical perspective that the introduction of certain quantitative or qualitative measures, which must be met by the social identifications of law and people expressing them, can always raise doubts that ultimately a very particular approach to law is supported instead of a neutral description of certain phenomena and trends. As it will be further developed below, Tamanaha's concept seems completely devoid of even the simplest elements of a more suspicious, critical view of law as well as theoretical constructions concerning it.

Continuing the matter of issues with his own concept, Tamanaha rightly formulates the next question: 'what uses of the concept of law should be treated as relevant in determining what people treat as the law, and thereby investigating what it is (on the basis of a given population or its part)?'.[25] In fact, Tamanaha puts emphasis on determining what people are sticking the 'label' of law to, whereas he treats laconically the issue of what people seem to be or may be associating with the very word 'law', and this can actually connote a lot. Namely, the fact that a person defines something as the law – in other words, 'puts the label' of law – does not mean that he or she thinks of the law as e.g. the product of the legislative bodies. The key term in this context after all is also used to designate certain empirical regularities. This, however, is not the most important problem. Even if someone uses the term 'law' in a way that Tamanaha himself seems to have in mind, that is, as an identification of a certain type of normativity that appears (or may exist) in human societies, it is also worth bearing in mind such possible uses of this term, which may not be expressed seriously and with confidence, but ironically or without certainty. Although this is truly a very significant issue about the commented concept, its author himself while recognizing this controversy, devotes surprisingly little room for any, even a preliminary attempt to solve it at least partially. This seems necessary if one wants to use Tamanaha's concept in accordance with one of its purposes – to conduct empirical research. Without addressing the issue raised here, adequate interpretation of the collected empirical data, that is, the views of the society or its part on what the law is, will be very difficult if not impossible.[26]

Meanwhile, Tamanaha rapidly goes on to indicate another problem which in his opinion are linguistic (as well as cultural) differences related to the word 'law'.[27] He claims that, although in many ethnic languages one can find words that are equivalent to the Polish wording 'prawo' ('law'), they can ultimately mean something different or be used in subtly distinct contexts. For instance, is it possible to juxtapose the Poles' statements about what 'law' is to them with those by the Germans indicating what '*Recht*' is to them? In other words, Tamanaha fears to encounter great difficulties while comparing the empirical researches carried out in different countries. In light of the previously raised fundamental problem of using the concept of law even

23 Ibidem, p. 199–200.

24 Ibidem, p. 200, and also p. 166–167.

25 Ibidem, p. 200, and also p. 168–169.

26 Added to this can be the concern for individual prejudices of interpreters/researchers and their impact on analyzing empirical data, see B. Truffin, O. Struelens, *Through the Looking Glass of Diversity. The Right to Family Life from the Perspectives of Transnational Families in Belgium* (in:) G. Corradi, E. Brems, M. Goodale (eds.), *Human Rights Encounter Legal Pluralism. Normative and Empirical Approaches*, Oxford–Portland–Oregon 2017, p. 207–208.

27 B. Z. Tamanaha, *A General Jurisprudence…*, op. cit., p. 200, and also p. 169.

on the basis of just one ethnic language, which would be taken into account in empirical research, it is surprising that Tamanaha, without solving it, considers using his own concept also on an international scale. Without even putting a solution forward to problems related to the possible use of his concept on the scale of one country, he claims that it can be used for comparative studies. Most likely, this is where the issue of identifying the relevant use of the concept of law will pile up with the problems of translation.

Clearly focusing on the word 'law' and its equivalents in other ethnic languages leads Tamanaha to see another problem, in his own opinion – the inadequacy of his concept towards indigenous, aboriginal or tribal communities that may not contain the word 'law' in their languages.[28] In other words, he admits that his concept is not of a universal range, and it cannot be applied to all human communities. Although this is a legitimate observation, one may wonder whether the non-universality of a similar concept should be assessed in terms of its flaws or imperfections.

Although the commented author seems to notice some significant issues of his own construction, one can get the impression that he does not pay too much attention to even partially referring to them in a more critical way. In addition, there are other controversies that may be pointed out in regards to his non-essentialist legal pluralism, which are not raised by the author at all.

First of all, the following questions arise when confronted with this concept. Does the law really only is to be constituted by the fact that a certain group of people seems to mark something as law? Is the law just a 'label' put by people to various objects and phenomena? Would the people chosen by Tamanaha to undergo an assessment in accordance with his assumptions agree with his concept? In his position, a specific tension can be identified. On the one hand, he rightly wants to explore and get to know what people perceive as law. On the other, however, he comes from rather unpopular and counterintuitive thesis that law is empty, without any slightest essence, and only the subjective views ultimately decide on what it is. He, therefore, seems to favour the 'folk', democratic view on the law but, as a consequence, proposes in its own way a radical, theoretical construction with, in all likelihood, negligible social support. Certainly, a closer look at the discussed concept will probably lead to a conclusion that Tamanaha, by claiming that law is what people identify as law, really operates at the level of certain meta-views and does not set his notion in the same row with specific views on the subject matter, which certainly in the majority of cases are essentialistic (more or less). One can, however, doubt whether Tamanaha clearly enough emphasizes the status of his own assertions, suggested here.

Does the law really only is to be constituted by the fact that a certain group of people seems to mark something as law? Is the law just a 'label' put by people to various objects and phenomena? Would the people chosen by Tamanaha to undergo an assessment in accordance with his assumptions agree with his concept?

28 Ibidem, p. 203–205.

Such emphasis of the level on which Tamanaha seems to operate is necessary especially if one imagines a growing popularity of his thesis which claims that the law has no essence and is only what people consider it to be. For if the members of a particular society will begin to increasingly believe in this thesis, some negative social consequences can be expected to follow. When people are convinced that in fact their subjective judgments determine what the law is and what it is not, and their views are not compatible with one another, one can expect an increase in the antagonisms between the representatives of different views or not necessarily socially functional nonconformism (violating something that some perceive as the law by those who disagree with this opinion). In light of this statement, Tamanaha surely wants to include as many social views as possible and represents a kind of democratic descriptivism. One may wonder, however, if he is not going too far, or, as a consequence, is not seemingly trying to opt out from taking into account and suggesting solutions to predictable or actually existing deep political and social disputes over the law. The disputes concerning the Polish Constitutional Tribunal or the referendum in Catalonia of 1st October 2017, mentioned at the beginning of this paper, can obviously be easily included in Tamanaha's general idea, according to which people may disagree in their identifications of law. Colloquially speaking, some may simply think one thing, while others another. Between such groups, there may be clear and sometimes even fierce conflicts in which each party will uphold their original thesis, and thus insist on their identification of law. It must, however, be openly said that a more general theoretical concept is not needed to draw similar conclusions. In light of a general life observation that people tend to disagree over specific issues, and so in the face of pluralization of views on particular matters, the non-essentialist legal pluralism seems to become a rather trivial concept. It remains only a very general frame for describing certain phenomena.

Tamanaha, however, does not in any way propose or even seem interested in answering the question of how to proceed in the light of certain cases of legal pluralism. It is right here that Tamanaha's far-reaching lack of commitment and his emphasis on descriptiveness are manifested with complete omission of a critical discussion about how to assess manifestations of legal pluralism and react to negative cases. In other words, he does not bother to take into account the social reality when argues that the definitions of law or hierarchies of the types of law are inadequate. From the perspective of a theoretician, it may be that even the majority of them are actually wrong. One should, however, keep in mind that definitions or hierarchies can also perform social functions by structuring interactions in a given population, contributing to greater predictability of life and being one of the pillars of the social order. Should a situation really be deemed inappropriate when a given definition of law or hierarchy of the types of law become more popular in a society or even simply accepted by its members as a result of adequate, thorough and non-coercive argumentation in their favour? Are definitions and hierarchies unconditionally wrong from this social perspective? Tamanaha seems to completely ignore these questions or not notice them. It is in a way paradoxical to be dealing with legal pluralism as a social phenomenon, arising from the fact that people differently identify the law, while omitting the importance of its broadly recognized definitions for the functioning of a society. There should be no illusions though that various manifestations of legal pluralism may cause more social problems than constitute their solutions. The latter, however, are not even suggested by Tamanaha in any way. It thus seems that his approach of a socially non-involved scholar prevails over the will to take into account the current realities and their problems or needs.[29] In this sense, Tamanaha is quite a conservative sociologist of law. He describes but does not even consider different alternatives in relation to something that cannot always be positively evaluated.

It is also worth emphasizing that for Tamanaha himself his concept seems quite difficult for consistent adherence. On the level of assumptions, he wants to study people's identification of different objects and phenomena as law, putting thereby significant

29 This can, in turn, be associated with his previous remarks on the political involvement of part of the Anglo-American sociology of law, which are not lacking truth; see. B. Z. Tamanaha, *Realistic Socio-Legal Theory. Pragmatism and a Social Theory of Law*, Oxford 1997, p. 20–24.

emphasis on subjectivity. However, in many points of his deliberations, Tamanaha mentions the study of the relationship between different types of law and even performs simplified analyses, such as the relation between the state law and religious law.[30] It can, therefore, be said that in these passages, he discusses not just the subjective beliefs, but what these beliefs can relate to. Tamanaha can obviously be accounted for not giving up in these passages his fundamental constructivist assumption that it is the law what people identify as such. It can be claimed, however, that he is considering relations between the already identified and generalized characteristics of specific types of law, established on the basis of empirical research. What remains problematic, however, is that Tamanaha has not conducted such research nor even has referred to studies that could serve him as a basis for such generalization and a discussion about the relationships between different kinds of laws. This detail, however, is not the only one in Tamanaha's argumentation that may raise doubts.

Although this is undoubtedly a very strong wording, one can find in his deliberations some contradiction almost bordering with hypocrisy. At the core of non-essentialist legal pluralism, Tamanaha declares some kind of openness to various views in line with the statement that law is what people recognize as such, but on the other hand, he carries quite strong criticism leading eventually to rejecting other ways of identifying law, which, like even Hart's concept, have gained great recognition and it cannot be ruled out that they form a part of informal intuitions about law. It is difficult to criticize, without contradicting oneself, the common definitions of law and legal pluralism conceptualizations built on their basis, by assuming that the law is ultimately what people deem it to be. Tamanaha's discussion with the concept of already mentioned Teubner is an exemplification of this state of affairs.[31] It is also worth quoting for it allows disclosing perhaps a further issue with Tamanaha's concept, which can be reduced to the following accusation of incomplete pursuance of own assumptions and thus falling in contradiction which can even be described as fundamental or basic.

Teubner, as one of the recognized representatives of systemic or autopoietic theories of law, by referring to the work of Niklas Luhmann, assumes that the law is ultimately a set of messages (communications) made on the basis of a binary code of the legal/illegal. To simplify, certain phenomena which relate to messages based on the codes such as profit/loss or power/lack of power, and so constituting respectively economic or political phenomena remain legally irrelevant until they are observed from the perspective of the legal binary code, regardless of whether they are referred to as legal or illegal. On the other hand, when a legal communication is formulated, even regarding a phenomenon very rarely associated with official law or objectively not constituting the subject of formally binding regulations, it becomes a part of the system-theoretically understood law. Beginning with such general assumptions, for Teubner legal pluralism means 'multiplicity of diverse communicative processes that observe social action under the binary code of legal/illegal',[32] and – by adding – different observations of the same broadly understood subject do not have to coincide in coding. The same can be recognized by specific messages as legal and, at the same time, illegal by others.

Apart from the question on how reliable and adequate Tamanaha is in conveying the concept of Teubner,[33] it must be said that his most important objection, in the discussed context, is imputing huge complexity in the identification of law based on a binary code due to the fluidity and dynamics of communication as well as the fact that the legal/illegal distinction is invoked not only clearly and explicitly, but also implicitly. In other words, Tamanaha criticizes the focus on language or privileging of communication processes in the conceptualization of law and legal pluralism in Teubner. Although similar doubts may be raised, it is

30 B. Z. Tamanaha, *A General Jurisprudence…*, op. cit., p. 199; idem, *Understanding Legal Pluralism…*, op. cit., p. 396–409.

31 B. Z. Tamanaha, *A General Jurisprudence…*, p. 186–191.

32 G. Teubner, *The Two Faces of Janus. Rethinking Legal Pluralism* (in:) K. Tuori, Z. Bankowski, J. Uusitalo (eds.), *Law and Power. Critical and Socio-Legal Essays*, Liverpool 1997, p. 128.

33 Cf. R. Nobles, D. Schiff, *Observing Law through Systems Theory*, Oxford–Portland–Oregon 2013, p. 91–99.

quite puzzling and even paradoxical that such criticism is formulated by Tamanaha. After all, he ultimately favours language or rather just one word – 'law' – and its possible counterparts in other ethnic languages. He claims that '(…) if no group within a society refers to «law», then there is no law in that society'.[34] The law exists when a given group of people defines something as the law, using a proper word in the right meaning. Not only it is possible, therefore, to see the specific hypocrisy of Tamanaha in his assessment of Teubner, linguistic marking of specific objects and phenomena as law and possible research perspectives; almost excessive descriptivism and specific non-criticality and lack of traces of engagement in the face of actual and predictable manifestations of socially negative (destructive) legal pluralism; not recognizing important social functions of definitions and hierarchies of law; raising doubts confidence in the non-essentialism of his own concept and the possibility of delimiting on its grounds the law from non-law. Of course, against

Does Tamanaha actually avoid any assumptions about the even minimum essence of law if he pays so much attention to whether there are people in a specific community who describe something through the specifically understood word 'law' and its counterparts in other languages?

but also start wondering whether Tamanaha ultimately does not contradict himself and yet fails to carry out all the deliberations in line with the original assumptions. In the end, does Tamanaha actually avoid any assumptions about the even minimum essence of law if he pays so much attention to whether there are people in a specific community who describe something through the specifically understood word 'law' and its counterparts in other languages?

As can be noted from the above comment, Tamanaha's concept is controversial and problematic on many levels. Certain doubts may also arise from the argumentation that leads to it and justifies it. Its author can be accused, among other things, of the following: very broad and exceptionally bold generalizations used as a starting point; bringing charges against others while seemingly duplicating some of the criticized schemes; not developing important strands regarding other conceptualizations of legal pluralism, the idea of Tamanaha seems to allow a much clearer distinction between the law and non-law, with acceptance of a constructivist perspective. In this regard only, reaching for this concept can be explained. However, one has to be conscious of it in a more complete way as a tool for potential use in one's own ventures. The above considerations are conceived as a more detailed, critical analysis of non-essentialist legal pluralism, which suggests to those interested, either theoretically or empirically, sometimes subtle yet significant problems whose solving, even partially, may require modification of the original Tamanaha's proposal, reaching for another theoretical basis or creating own concept of legal pluralism. The latter method may be desirable particularly when aspiring to analyze certain realities (e.g. a particular state in a given time interval). Tamanaha, in turn, undoubtedly has universal ambitions about his own concept. This general idea is to be applicable to numerous different situations.

34 B.Z. Tamanaha, *A General Jurisprudence…*, op. cit., p. 201.

Perhaps, however, this is another mistake not only made by Tamanaha, and the concepts of legal pluralism should not look for such a broad, global appeal. Instead, perhaps the most appropriate approach is to build many concepts of legal pluralism focused on very specific realities, such as those in contemporary Poland, Spain, Ireland, Canada, Japan, Indonesia, India, Turkey, Lebanon etc. In order to assess whether such a scenario will actually produce better results than the non-essentialist legal pluralism, an attempt must be made to implement it.

Bibliography

Daniels D. v., *A Genealogical Perspective on Pluralist Jurisprudence* (in:) N. Roughan, A. Halpin (eds.), *In Pursuit of Pluralist Jurisprudence*, Cambridge 2017, p. 163–191.

Dupret B., *Adjudication in Action. An Ethnometodology of Law, Morality and Justice*, transl. P. Ghazaleh, Farnham 2011.

Dupret B., *Prawo w naukach społecznych* [Law in Social Sciences], transl. J. Stryjczyk, Warszawa 2010.

Ehrenberg K. M., *The Functions of Law*, Oxford 2016.

Gizbert-Studnicki T., Dyrda A., Grabowski A., *Metodologiczne dychotomie. Krytyka pozytywistycznych teorii prawa* [Methodological Dichotomies. A Critique of Positivist Theories of Law], Warszawa 2017.

Himma K.E., *Do Philosophy and Sociology Mix? A Non-Essentialist Socio-Legal Positivist Analysis of the Concept of Law*, „Oxford Journal of Legal Studies" 2004, vol. 24, no. 4, p. 717–738.

Kojder A., *Pluralizm prawny* [Legal Pluralism] (in:) A. Kojder, Z. Cywiński (eds.), *Socjologia prawa. Główne problemy i postacie* [Sociology of Law. Main Problems and Figures], Warszawa 2014, p. 295–298.

Kojder A., *Z Czerniowców w szeroki świat… Eugen Ehrlich i narodziny idei socjologii prawa* [From Czernowitz to the Wide World… Eugen Ehrlich and the Birth of Idea of Sociology of Law] (in:) A. Flis (ed.), *Stawanie się społeczeństwa. Szkice ofiarowane Piotrowi Sztompce z okazji 40-lecia pracy naukowej* [Becoming of a Society. Sketches Offered to Piotr Sztompka on the Occasion of 40th Anniversary of Scientific Work], Kraków 2006, p. 125–146.

Muñiz-Fraticelli V. M., *The Structure of Pluralism. On the Authority of Associations*, Oxford 2014.

Nobles R., Schiff D., *Observing Law through Systems Theory*, Oxford–Portland–Oregon 2013.

Radziewicz P., Tuleja P. (eds.), *Konstytucyjny spór o granice zmian organizacji i zasad działania Trybunału Konstytucyjnego: czerwiec 2015 – marzec 2016* [Constitutional Dispute about the Limits of Changes in the Organization and Rules of Operation of the Constitutional Tribunal: June 2015 – March 2016], Warszawa 2017.

Saleh-Hanna V., *Women, Law, and Resistance in Northern Nigeria. Understanding the Inadequacies of Western Scholarship* (in:) V. Saleh-Hanna (ed.), *Colonial Systems of Control. Criminal Justice in Nigeria*, Ottawa 2008, p. 293–353.

Stawecki T., *Prawo w książkach i prawo na dyskach – konsekwencje dla praktyki wykładni prawa* [Law in Books and Law on Disks – Consequences for the Practice of Interpreting the Law] (in:) S. Lewandowski, H. Machińska, J. Petzel (eds.), *Prawo, język, logika. Księga jubileuszowa profesora Andrzeja Malinowskiego* [Law, Language, Logic. The Jubilee Book of Andrzej Malinowski], Warszawa 2013, p. 237–259.

Stawecki T., Staśkiewicz W., Winczorek J., *Między policentrycznością a fragmentaryzacją. Wpływ Trybunału Konstytucyjnego na polski porządek prawny* [Between Polycentrism and Fragmentation. The Impact of Constitutional Tribunal Rulings on the Polish Legal Order], Warszawa 2008.

Tamanaha B. Z., *A General Jurisprudence of Law and Society*, Oxford 2001.

Tamanaha B. Z., *A Non-Essentialist Version of Legal Pluralism*, „Journal of Law and Society" 2000, vol. 27, no. 2, p. 296–321.

Tamanaha B. Z., *A Realistic Theory of Law*, Cambridge 2017.

Tamanaha B. Z., *Realistic Socio-Legal Theory. Pragmatism and a Social Theory of Law*, Oxford 1997.

Tamanaha B. Z., *The Folly of the 'Social Scientific' Concept of Legal Pluralism*, „Journal of Law and Society" 1993, vol. 20, no. 2, p. 192–217.

Tamanaha B. Z., *Understanding Legal Pluralism. Past to Present, Local to Global*, „Sydney Law Review" 2008, vol. 30, no. 3, p. 375–411.

Teubner G., *The Two Faces of Janus. Rethinking Legal Pluralism* (in:) K. Tuori, Z. Bankowski, J. Uusitalo (eds.), *Law and Power. Critical and Socio-Legal Essays*, Liverpool 1997, p. 119–140.

Truffin B., Struelens O., *Through the Looking Glass of Diversity. The Right to Family Life from the Perspectives of Transnational Families in Belgium* (in:) G. Corradi, E. Brems, M. Goodale (eds.), *Human Rights Encounter Legal Pluralism. Normative and Empirical Approaches*, Oxford–Portland–Oregon 2017, p. 203–221.

Twining W., *A Post-Westphalian Conception of Law*, „Law & Society Review" 2003, vol. 37, no. 1, p. 199–257.

Twining W., *General Jurisprudence. Understanding Law from a Global Perspective*, Cambridge 2009.

Winczorek J., *Pluralizm prawny* [Legal Pluralism] (in:) A. Kociołek-Pęksa, M. Stępień (eds.), *Leksykon socjologii prawa* [Lexicon of Sociology of Law], Warszawa 2013, p. 181–186.

Winczorek J., *Pluralizm prawny wczoraj i dziś. Kilka uwag o ewolucji pojęcia* [Legal Pluralism Yesterday and Today. A Few Remarks on the Evolution of the Concept] (in:) D. Bunikowski, K. Dobrzeniecki (eds.), *Pluralizm prawny. Tradycja, transformacje, wyzwania* [Legal Pluralism. Tradition, Transformations, Challenges], Toruń 2009, p. 12–35.